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No. 94-1103

IN THE UNITED STATES SUPREME COURT

October Term 1994

Floyd Bolton, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

James C. Chandler
Counsel of Record
Peter T. Van Dyke
Sam Reynolds Fulkerson
Of the Firm:
LYTLE SOULÉ & CURLEE
1200 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102
(405) 235-7471

Attorneys for Scrivner, Inc.

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RULE 29.1 STATEMENT

Respondent, Scrivner, Inc., was at all relevant times an Oklahoma corporation; its parent corporation was Franz Haniel & Cie, G.m.b.H., a German corporate entity. Respondent recently has been purchased by Fleming Companies, Inc., a publicly traded Oklahoma corporation with no parent corporation, but with the following partially-owned subsidiaries: Big W of Florida, Inc.; Dairy Fresh of Louisiana, Inc.; South Ogden Super Duper, Inc.; and, University Foods, Inc.

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT AND AUTHORITY 10

PROPOSITION I 10

THE COURT OF APPEALS CORRECTLY DETERMINED THAT BOLTON WAS NOT A "DISABLED PERSON" UNDER THE ADA'S DEFINITIONAL REQUIREMENTS . . . 10

PROPOSITION II. 19

THE COURT OF APPEALS CORRECTLY DETERMINED THAT BOLTON FAILED TO RAISE A GENUINE ISSUE OF FACT REGARDING PRETEXT UNDER HIS ADEA CLAIM 19

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Bolton v. Scrivner, Inc.,
36 F.3d 939, 941-45
(10th Cir.1994) 7, 10, 11, 15, 17, 23, 28

Bolton v. Scrivner, Inc.,
836 F.Supp. 783, 786-88, 790-93
(W.D. Okl. 1993) . 6, 12, 15, 17, 20-25

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548 (1986) . 25

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28
(10th Cir. 1994) 11

McDonnell-Douglas Corp. v. Green,
411 U.S. 792, 93 S.Ct. 1817 (1973) . 22

Moisi v. College of the Sequoias Community College Dist.,
25 Cal.Rptr.2d 165 (Cal.App. 1993)
(*construing Hicks*) 24-26, 28

St. Mary's Honor Society v. Hicks,
--- U. S. ---,
113 S.Ct. 2742,
125 L.Ed.2d 407
(1993)) 20, 22, 24, 26, 27

Welsh v. City of Tulsa, Oklahoma,
977 F.2d 1415, 1419 (10th Cir. 1992) 15

FEDERAL STATUTES

29 C.F.R. §1630.2(j)(2) 12-16

29 U.S.C. §§621 et seq. 2

42 U.S.C. §12102(2) 12

42 U.S.C. §§12101 et seq. 2

Fed.R.Civ.P. Rule 56(e) 25

STATEMENT OF THE CASE

Bolton[1] was an employee of Scrivner, a wholesale grocery supplier, at all relevant times. Bolton was employed as an "order selector" at Scrivner's Oklahoma City warehouse. The job is physically demanding, and requires repetitive lifting and handling of items weighing 50 pounds or more. Bolton was a member of Teamsters Local Union No. 886, and his employment was subject to the terms of a collective bargaining agreement between Scrivner and the Teamsters.

Bolton sustained a work-related injury in 1991, and went on medical leave of absence beginning October 19, 1991, under the terms of the collective bargaining agreement. A Scrivner-selected

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[1] Petitioner, Floyd Bolton, will be referred to in this brief as "Bolton"; Respondent, Scrivner, Inc., will be referred to in this brief as "Scrivner."

doctor opined that Bolton was physically unable to return to his order selector job in July 1992. In May 1992, Bolton's doctor also had determined that Bolton was physically unable to return to his order selector job. Bolton never provided Scrivner with a contrary medical opinion, or with a medical release authorizing his return to his order selector job. Consequently, Scrivner did not allow Bolton to return to his order selector job.

Bolton filed suit in the United States District Court for the Western District of Oklahoma on March 2, 1993, alleging violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 et seq., and the Americans With Disabilities Act ("ADA"), 42 U.S.C.

§§12101 et seq., under disparate treatment theory.[2]

Scrivner moved for summary judgment on Bolton's federal law claims on the basis that Bolton failed to establish a *prima facie* case of either intentional age or disability discrimination. Scrivner asserted that Bolton could not succeed on his disability discrimination claim under disparate treatment theory because he could not show that he was a "disabled person" under the ADA or that he requested job accommodation and, thus, could not establish that he was an "otherwise qualified" disabled person under the ADA. Scrivner also asserted that Bolton had no evidence of unlawful intent.

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[2] Bolton also asserted supplemental state law claims. The District Court declined to exercise jurisdiction over Bolton's supplemental claims and dismissed them without prejudice after granting summary judgment against Bolton on his federal law claims. Bolton's state law claims are not at issue in this appeal.

Scrivner asserted that Bolton could not succeed on his age discrimination claim under disparate treatment theory because he could not show that he was adequately performing his assigned job duties at the time of his alleged termination; that he was permanently replaced by a younger person; or, that Scrivner acted with unlawful intent.[3]

In responding to Scrivner's motion for summary judgment, Bolton based his claim of disabled status under the ADA solely on an alleged substantial limitation of the major life activity of working, but he failed to produce evidence that his physical impairment prevented him from performing a class of jobs or a broad range of jobs in various classes. Bolton

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[3] Scrivner also denied that Bolton was terminated; instead, although Bolton was not allowed to return to work, he remained employed under a medical leave of absence policy pursuant to the terms of the collective bargaining agreement.

did not allege a substantial limitation of any other major life activity.

For his age discrimination claim, Bolton alleged as circumstantial evidence of unlawful intent that Scrivner reaped economic benefit by ridding itself of older, "costlier" employees; and alleged as direct evidence of unlawful intent that a member of Scrivner management who was not involved in the challenged decision-making process made age-related comments to him prior to his leave of absence.

It is essential to an understanding of this litigation to realize that Bolton's age and disability discrimination claims were inseparably joined, as Bolton alleged essentially the same set of facts in support of both claims.

The District Court granted Scrivner's motion for summary judgment on Bolton's claims for intentional age and disability

discrimination, concluding: 1) that Bolton failed to produce any evidence that his alleged physical impairment substantially limited one or more of his major life activities, including his ability to work; and, 2) that Bolton failed to produce any evidence of unlawful age discrimination. *Bolton v. Scrivner, Inc.*, 836 F.Supp. 783 (W.D. Okl. 1993).

The United States Court of Appeals for the Tenth Circuit affirmed the District Court, ruling that Bolton failed to establish that he was substantially limited in the major life activity of working and, thus, he failed to establish that he was a disabled person under the ADA; and, that Bolton failed to produce evidence of unlawful age discrimination because there was no nexus between the alleged discriminatory comments and the challenged employment decision, nor was

pretext shown by potential cost savings inherent in replacing Bolton with younger, casual labor. *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994).

SUMMARY OF ARGUMENT

As set forth in Supreme Court Rule 10.1, "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Bolton raises no constitutional issue, no claim of conflict among the circuits, and no issue of significance beyond the facts of this case. Bolton also fails to identify an important question of federal law which should be settled by this Court.

In its motion for summary judgment, Scrivner alleged specific facts, which, if true, entitled it to judgment against Bolton as a matter of law. Bolton has never controverted any of the material

facts Scrivner set forth in support of its dispositive motion.

Bolton asserted that he was a disabled person under the ADA solely on the basis of an alleged substantial limitation of the major life activity of working. Bolton, however, failed to produce any evidence that his alleged physical impairment substantially limited him in any major life activity -- including the major life activity of working. Instead, Bolton only produced evidence that his alleged impairment impacted his ability to perform a single job, to-wit: the order selector job he held before his October 1991 injury.

Under his intentional age discrimination claim, Bolton failed to offer either direct or circumstantial evidence from which the District Court could infer discriminatory motive. Of

particular import, under his ADA claim plaintiff acknowledged that his alleged physical impairment played a significant role in Scrivner's challenged employment decision, thus undermining any inference of age discrimination. Further, the direct evidence of unlawful intent which plaintiff advanced consisted of alleged remarks by an individual not involved in the decision-making process, i.e., plaintiff failed to establish a nexus between the alleged comments and the challenged employment decision. Consequently, plaintiff's age discrimination claim failed at the pretext stage.

The conclusions and inferences drawn by the District Court from the undisputed material facts were the only logical and reasonable ones which could have been drawn from the evidence presented to it by

the parties. Accordingly, reliance upon those undisputed material facts in granting Scrivner's motion for summary judgment was entirely proper. Likewise, the Court of Appeal's reliance on those same undisputed material facts in affirming the District Court was entirely proper. In sum, Bolton has failed to identify any genuine issues of fact which would preclude a judgment for Scrivner.

ARGUMENT AND AUTHORITY

PROPOSITION I.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT BOLTON WAS NOT A "DISABLED PERSON" UNDER THE ADA'S DEFINITIONAL REQUIREMENTS

In reviewing a grant of summary judgment, the standard of review is *de novo* and the record is viewed in the light most favorable to the party opposing summary judgment. *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 941 (10th Cir. 1994);

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir. 1994). An appellate court may affirm summary judgment "on grounds other than those relied on by the district court when the record contains an adequate and independent basis for that result." *Bolton*, 36 F.3d at 942 (*quoting Cone*, 14 F.3d at 528).

In this case, Bolton does not challenge any of the material facts established by Scrivner, but merely challenges the conclusions drawn from those facts by the lower courts.

Bolton argues on appeal that the lower courts improperly determined that he was not disabled under the ADA because he produced some evidence of a physical impairment to his feet. Bolton asserts that he produced evidence establishing that he was a disabled person under all

three definitional prongs of the ADA, wherein an individual may establish disabled status by producing evidence of actual impairment that substantially limits a major life activity, a record of such an impairment or being regarded as having such an impairment. 42 U.S.C. §12102(2). Bolton, however, failed to raise the issues of whether he qualifies as a disabled person under the ADA based on a perceived impairment or a record of impairment before the Court of Appeals and, thus, neither is at issue here. *Bolton*, 36 F.3d at 942, 944 n. 4.

As to his claim that he had an impairment which substantially limited his ability to work, Bolton simply failed to produce evidence sufficient to support such a finding. Pursuant to 29 C.F.R. §1630.2(j)(2), one of the Equal Employment Opportunity Commission's implementing

regulations for Title I (Employment) of the ADA, three factors "should be considered" when determining whether an alleged impairment substantially limits *any* major life activity: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment."

With respect to the major life activity of *working*:

> (i) the term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. §1630.2(j)(3)(i).

Three additional factors "may be considered" when determining whether an impairment substantially limits the major life activity of working:

> (A) [t]he geographical area to which the individual has reasonable access;
>
> (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. §1630.2(j)(3)(ii).

The Court of Appeals for the Tenth Circuit previously has recognized the relevance of these latter factors in

determining substantial limitation of employment potential under the Rehabilitation Act of 1973. *See Welsh v. City of Tulsa, Oklahoma*, 977 F.2d 1415, 1419 (10th Cir. 1992).

The lower courts correctly held that the ADA defines "disability" in substantially the same terms as the Rehabilitation Act defines "handicap" (now "disability"), and that relevant case law developed under the Rehabilitation Act is generally applicable in construing the term "disability" as used in the ADA. *Bolton*, 36 F.3d at 942-43; *Bolton*, 836 F.Supp. at 787; *see also* 29 C.F.R. Part 1630 - Appendix (Interpretive Guidance to Title I of the ADA), §1630.2(g). Accordingly, the lower courts properly relied on the analysis developed under the Rehabilitation Act in determining

substantial limitation of the ability to work under the ADA.

The additional factors listed at 29 C.F.R. §1630.2(j)(3)(ii) are misconstrued by Bolton. A proper reading of the ADA and its implementing regulations shows that when a claim of disabled status is predicated on an alleged substantial limitation of the ability to work, factors additional to those set forth in 29 C.F.R. §1630.2(j)(2) *should* be considered in making a particularized determination of disabled status, and that those additional factors set forth at 29 C.F.R. §1630.2(j)(3)(ii) are simply illustrative of the additional factors that should be considered. *See* 29 C.F.R. Part 1630, Appendix (Interpretive Guidance on Title I of the Americans With Disabilities Act), §1630.2(j) (Substantially Limits).

In sum, the lower courts found that the record was devoid of evidence supporting any of the three additional factors relevant in determining substantial limitation of the ability to work. *Bolton*, 36 F.3d at 943-44; *Bolton*, 836 F.Supp. at 788. Bolton only asserted and produced evidence that he was unable to work at a single job, i.e., his former order selector position. Bolton wholly failed to produce evidence that his alleged impairment *substantially limited* his employment potential, as the term is defined in the ADA's implementing regulations. The District Court correctly held, and the Court of Appeals properly affirmed, that inability to perform a single, particular job is not evidence of substantial limitation of the major life activity of working. *Bolton*, 36 F.3d at 943-44; *Bolton*, 836 F.Supp. at 788.

Because Bolton failed to offer specific evidence showing a genuine dispute of material fact regarding his status as a disabled person under the ADA, an element on which he bore the burden of proof at the summary judgment stage and on which he would have borne the burden of proof at trial, Scrivner's motion for summary judgment on Bolton's ADA claim was properly granted and, subsequently, affirmed.

Bolton urges on appeal that the lower courts have "substituted their own judgment for what a disabled person is, rather than allowing the jury to determine the issue." Pet. for Cert. at 16. Bolton's argument, if accepted, would obviate the role of the courts in the pretrial phase of litigation and, indeed, would make summary disposition of any case effectively impossible. In the absence of

record evidence of substantial limitation, Bolton attempts to rely on "logic and human experience" to defeat Scrivner's motion for summary judgment. *Id.* at 21. Bolton should have offered proof, not conjecture, in resisting Scrivner's motion for summary judgment.

PROPOSITION II.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT BOLTON FAILED TO RAISE A GENUINE ISSUE OF FACT REGARDING PRETEXT UNDER HIS ADEA CLAIM

Bolton offered both purported circumstantial and direct evidence of unlawful age discrimination. As circumstantial evidence, Bolton alleged, albeit without supporting evidence, that Scrivner *may* have saved money by replacing him with a less expensive casual laborer. The District Court assumed for the purposes of Scrivner's motion for summary judgment that, although Bolton offered no

evidence of the identity or age of the casual laborer who purportedly replaced him, Bolton's claim was sufficient to establish a *prima facie* case. *Bolton*, 836 F.Supp. at 790.

The District Court nevertheless held that the circumstantial evidence of unlawful intent was inadequate at the pretext stage of Bolton's case because Bolton's *ADA claim* was premised on the allegation that Scrivner refused to allow him to return to work because of his *physical impairment*. *Id.* As the District Court held: "In so arguing, plaintiff acknowledged that his physical limitations played a significant role in Scrivner's decisionmaking." *Id.* (*relying on St. Mary's Honor Society v. Hicks*, --- U. S. ---, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). The District Court concluded

that Bolton failed to carry his ultimate burden of proving that Scrivner's asserted nondiscriminatory reason for the challenged employment decision, i.e., Bolton's physical inability to perform his assigned job duties, was a pretext for age discrimination. *Id.* at 790-92.

Bolton also offered purported direct evidence of unlawful intent in the form of remarks allegedly made by a supervisor not involved in the challenged decision-making process. The District Court correctly held that Bolton failed to establish any nexus between the alleged comments and the challenged employment decision. *Id.* at 792-93. Bolton offered no evidence to contradict Scrivner's assertion that the supervisor who allegedly made age-related remarks was not involved in the decision-making process.

Contrary to his assertions herein, Bolton had his opportunity to produce evidence of pretext to the District Court, but he failed to do so. The District Court correctly held that under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), and *Hicks, supra*, that Bolton failed to produce evidence sufficient to persuade a jury that Scrivner's asserted nondiscriminatory reason for the challenged employment decision, i.e., his physical inability to perform his job, was merely a pretext for age discrimination. *Bolton*, 836 F.Supp. at 790.

The District Court did not make improper credibility assessments in determining that Bolton's ADEA claim failed at the pretext stage. Rather, the District Court correctly relied on the

internally contradictory nature of Bolton's age and disability discrimination claims in assessing his evidence. As the District Court noted:

> Essentially the same set of facts are used by Bolton to prove both claims. This overlap of facts puts plaintiff in a dissonant posture, . . . because for success on his first claim he must be disabled and on his second claim, he must be able. These facts, and Scrivner's challenges to Bolton's legal conclusions, are the basis for this Court's analysis with respect to each statute.

Id. at 786-87.

Because of his ADA claim, Bolton was required to contend that a physical impairment played a significant role in the challenged employment decision. In so doing, Bolton fatally undermined his purported evidence of unlawful age discrimination. The Court of Appeals properly affirmed on the same basis. *Bolton*, 36 F.3d at 944-45.

Bolton tries to create the appearance of error where none exists by arguing that summary judgment generally is inappropriate at the pretext stage of an employment discrimination case because it necessarily entails "credibility" determinations within the province of the jury. In support, Bolton cites *Moisi v. College of the Sequoias Community College Dist.*, 25 Cal.Rptr.2d 165 (Cal.App. 1993) (*construing Hicks*).

The District Court properly rejected Bolton's argument and the reasoning of *Moisi* in pointing out that the California appellate court "misreads *Hicks* in light of well-established law regarding both employment discrimination and summary judgment procedures." *Bolton*, 836 F.Supp. at 791. The District Court properly interpreted *Hicks* to reaffirm precedent

holding that the ultimate burden of proving intentional prohibited discrimination always remains with the plaintiff, and that in order to avoid summary judgment the plaintiff must present sufficient evidence to create controversy regarding the defendant's asserted facially nondiscriminatory reason for the challenged action. *Id.* As the District Court held: "At the summary judgment stage, a plaintiff who does not produce specific evidence to create an issue of material fact is not allowed to avoid summary judgment and go forward to trial." *Id.* (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986) and Rule 56(e), Fed.R.Civ.P.).

The District Court properly criticized the central holding of *Moisi* for not requiring a plaintiff to produce

evidence creating an issue of material fact regarding the defendant's asserted facially nondiscriminatory reason. Under *Moisi*, plaintiff would be able "to ignore this burden of production and proceed to trial when he has offered no evidence that could possibly controvert defendant's justification." *Id.*

Hicks, properly construed, holds that once the defendant advances a facially nondiscriminatory reason for the challenged employment decision, the plaintiff must produce specific evidence sufficient for the factfinder reasonably to conclude that the challenged decision was improperly motivated by prohibited intent. Otherwise, the plaintiff is not entitled to take his case before the trier of fact. *See id.*

The District Court's application of summary judgment procedure is consistent with *Hicks* and other holdings of this Court. In contrast, the practical effect of Bolton's argument would be that any presumption arising in a plaintiff's favor after establishing a *prima facie* case would effectively preclude summary disposition, even if the defendant asserted a facially nondiscriminatory reason for the challenged decision. In sum, the establishment of a *prima facie* case would, *ipso facto*, preclude summary judgment and make a trip to the jury a virtual certainty; applicable law does not countenance such an absurd result. Accordingly, Bolton's argument was

properly rejected by the District Court, and should be rejected herein, also.[4]

CONCLUSION

For all of the reasons and arguments set forth above, Respondent, Scrivner, Inc., urges the Court to deny *certiorari* in this case.

James C. Chandler
Counsel of Record
Peter T. Van Dyke
Sam Reynolds Fulkerson

Of the Firm:

LYTLE SOULÉ & CURLEE
1200 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102
(405) 235-7471

Attorneys for Scrivner, Inc.

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[4] The Court of Appeals did not expressly address *Moisi* in affirming the District Court, although implicit in its analysis is that the District Court properly rejected the holding of *Moisi*. *Bolton*, 36 F.3d at 944-45.

CERTIFICATE OF SERVICE

I hereby certify that I am counsel of record for the Respondent and that on the 20th day of January, 1995, three (3) correct copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were hand-delivered to the following-named counsel:

Rick W. Bisher
Boettcher, Ryan & Martin
Central Park One, Suite 105
525 Central Park Drive
Oklahoma City, Oklahoma 73105

Counsel of Record for Petitioner,
Floyd Bolton.

James C. Chandler
Peter T. Van Dyke
Sam Reynolds Fulkerson